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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOAN H. COCKE, Respondent

The Respondent, JOAN H. COCKE, respectfully represents that the Writ of Certiorari should not be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit entered October 7, 1974.

REVIEW ON WRIT OF CERTIORARI
SHOULD NOT BE GRANTED

1. The State Court has not decided a Federal question within the meaning of Supreme Court Rule 19(a). The terms of the Civil Rights Act upon which Petitioner relies, refer to civil rights in every State and Territory and to State and Territorial laws which would deprive any citizen of the United States or other person within the jurisdiction thereof to any right, privilege or immunity secured by the Constitution and laws (P. 3,4,5). The questions presented by Petitioner (P.2) do not purport to claim relief because of any alleged denial of due process under a State law. The questions presented refer only to State Court orders and the alleged conclusion that the State Courts lacked jurisdiction over the State actions. No State statute denied Petitioner equal rights under the due process clause of the Constitution (Rice v. Sioux City Memorial Park Cemetery, Inc. 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed 897).

2. The Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Petitioner claims this to be true (P. 14). In the case of Paul v. Dade County 419 Fed. 2d 10, cited by Petitioner, the Circuit Court found that the State Court had determined the Constitutional issue in a prior action and that the District Court lacked jurisdiction to reconsider the same issues (P. 14). The District Court in the case of Concerned Consumers League v. O'Neill, 371 Fed. Supp. 644 dealt with facts which were in violation of the freedom of

religion under provisions of the First Amendment to the Constitution of the United States. This case cited by Petitioner is not relevant as Petitioner is concerned with the application of the Civil Rights Act, 42 U.S.C. §1981-1988 to the facts of the present question to determine whether or not he has been given due process of law under State judgments within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals has not decided an important State or Territorial question in a way in conflict with applicable State or Territorial law; and has not decided an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States; and has not decided a Federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

The Court of Appeals sustained the judgment of dismissal of the District Court which stated that the gravamen of the complaint is that the State Judicial System was perverted by the Defendants to result in the judgments against Plaintiff (Petitioner) in contravention of the Fourteenth Amendment. In this connection the District Court further stated it is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. It (complaint) wholly fails to show any conspiracy. As a result, the District Court found "the complaint does not state a claim under the Civil Rights Act" Scott v. California Supreme Court 426 F.2d 300 (9th Cir. 1970); Fed. R. Civ. P. 12(b)(6). (A Vol. II, pp 160, 161)

4. The Court of Appeals has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by the District Court, as to call for an exercise of the Supreme Court's power of supervision. Respondent submits the following argument in support of this conclusion as to why the Writ should not be granted.

PETITIONER'S QUESTIONS

1. The first question presented by Petitioner submits the proposition that the Writ be granted for the purpose of reviewing and vacating the decisions of the Arizona Court because the State Court lacked subject matter jurisdiction over the action. Whether the State Court lacked subject matter jurisdiction over the action is a conclusion reached by Petitioner alone.

2. The second question with respect to judicial immunity is also based on Petitioner's conclusion that the State Courts lacked subject matter jurisdiction over the actions.

It is clear that the Arizona Court dealt with a specific performance action for the purchase and sale of land within the State of Arizona and that all parties were Arizona residents and were properly in Court.

Petitioner has three reasons for claiming that the Arizona Courts lacked subject matter jurisdiction. He calls them ALTERATION OF CONTRACTS, INDISPENSABLE PARTIES, and WANT OF FINDINGS (P.12).

It can be said with respect to these three reasons that Petitioner is unable to distinguish between what constitutes jurisdiction and a court's power to exercise this jurisdiction. The Supreme Court of the United States has made this distinction in the case of General Inv. Co. v. New York Cent. R. Co., 271 U.S. 228, 70 L.Ed. 920, 46 S. Ct. 496, and has stated:

> "...By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits... Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction...If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

The District Court also considered Petitioner's reasons for stating that the State Courts did not have jurisdiction. The District Court stated:

> Plaintiff's first attack is on the jurisdiction of the state courts to decide the real estate dispute. His premise for this contention

> is that the courts proceeded to judgment in the absence of "indispensable parties." It is well settled that the considerations in rule 19(b) are equitable, not jurisdictional. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733 (1968) (Footnote omitted); see Jacobs v. United States, 367 F. Supp. 1275, 1281-84 (D. Ariz. 1973).
>
> Once this linchpin falls, plaintiff's complaint states no more that the history of a complex, sometimes confused litigation. (A Vol. II, p 160)

It is Respondent's position that Petitioner's conclusion that the State Courts lacked subject matter jurisdiction is not supported by the law or the decisions of the courts.

CIVIL RIGHTS STATUTES NOT APPLICABLE

A quick glance at the United States Code, Title 42, §§1981-1988 reveals that these sections are not applicable to the present situation. §§1981 and 1982 were enacted for the sole purpose of granting equal rights to citizens of all colors who may be deprived of such rights because of their color.

§1983 protects every person from deprivation of rights, privileges and immunities by any State by reason of a State statute, ordinance, regulation, custom or usage. In the instant case we are not dealing with State enactments but with Court proceedings and judgments.

An argument should not be necessary with respect to the meaning of §1985(3) and §1986. Griffin v. Breckenridge 91 S.Ct. 1790 403 U.S. 88 29 L.Ed. 2d 338.

The United States District Courts have had occasion to determine whether or not the Civil Rights statutes entitled a litigate to seek redress from State Court judgments in the United States District Courts.

In the case of Sexton v. Barry, 233 F.2d 220, the Court dismissed a complaint based on issues previously decided in a State Court and stated that:

> The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property, does not show that there has been a violation of

> the due process of law guaranty... The doctrine of due process does not confer the right to litigate the same question twice... The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination... Appellant had due process and the equal protection of the laws.

The Court concluded as follows:

> It is shown upon the face of this complaint that Appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that Appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act, 42 U.S.C.A., §1981 et seq. This Act does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court...

In the case of Dotlich v. Kane 497 F.2d 390, the Eighth Circuit dismissed an action under Civil Rights Act against

judges, title examiner, clerk and wife's attorney. The action alleged a conspiracy by all Defendants to deprive Plaintiff of his property interest in the family homestead without due process of law. Apparently the Plaintiff referred only to his divorce proceedings in the State Court to support such a claim. The Court held such a claim, arising as it does from the ordinary disposition of a divorce action in State Court, raises no Federal question.

In sum, the complaint states no Federal claim against any of the Defendants, and additionally, the subject matter of the complaint -- an objection to the distribution of the property in a divorce action -- is not within the jurisdiction of the Federal District Court. Thus we affirm the dismissal of the action.

In connection with the above case it should also be noted that the Petitioner and this Respondent were once husband and wife and that the underlying payment dispute mentioned by Petitioner (A Vol. I pp 14, 15 & 16) and referred to by the District Court (A Vol. II p 158) was one of the elements involved in the escrow in the specific performance action upon which the present action is based. Cocke v. Cocke 13 Ariz. App. 57, 474 P.2d 64.

The Petitioner's theory that the State Courts lacked subject matter jurisdiction because of alteration of contracts is conclusively refuted by the decision of the Arizona Court of Appeals in the case of Cocke v. Cocke, Supra, wherein the facts concerning the trust, proceeds of sale and the lack of interest of the

trustee, were found.

> First it should be noted that the trust agreement was the subject of extensive litigation in the original divorce proceedings, and there is no contention by defendant that he was not aware of its terms.
>
> After the decree of divorce was entered and when defendant desired to sell a portion of his separate property including a portion in which he held an undivided one-half interest with the trustee, defendant prevailed upon plaintiff to execute a letter to the trustee requesting the execution of the deed to defendant's buyer, without any indication to the trustee that the proceeds of this sale would be held in trust. One of the inducements made by defendant to plaintiff, testified to by plaintiff, was that the funds received from the sale would be free and clear of the trust. The sales contract and escrow instructions did not in any manner reflect the interest of the trustee in a portion of the property sold. After the sale was completed the parties made arrangements with the First National Bank as a collection

> agent to receive the proceeds of the sale of the property and to this end opened a checking account with that institution which required the signature of both plaintiff and defendant to withdraw funds therefrom. Again, this account does not in any manner refer to an underlying interest of the trustees in the proceeds of this sale.
>
> In such a case, where defendant, having knowledge of the revocable nature of the trust, has acted in a manner to cause a trustee to divest itself of its interest in a portion of that trust res in reliance upon the revocable feature of the trust, has purportedly induced others to act in reliance upon the revocable nature of the trust, and all of the defendant's acts after the fact are consistent with the trust being revocable, we hold that defendant is estopped to now assert that the trust is now irrevocable under the provisions of the property settlement agreement entered into between the parties in 1964.

Another case growing out of a previous divorce action in the State Court is the case of Hill v. McClellan, 490 F.2d 859. In this case the action

was commenced under the Civil Rights Act and again the Defendants were the judge, attorney and the Plaintiff's ex-wife. The Fifth Circuit held that a private person cannot be held liable under 42 U.S.C. §1983 unless his wrongful action was done under color of State law or State authority. Further, a private person alleged to have conspired with a State judge and attorney who are entitled to immunity cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. A Federal District Court has no original jurisdiction to reverse or modify the judgment of a State Court.

This same Circuit in the case of Hanna v. Home Insurance Company 281 F.2d 298, certiorari denied 81 S.Ct. 751, 365 U.S. 835, 5 L.Ed (2d) 747, rehearing denied 81 S.Ct. 1905, 366 U.S. 955, 6 L. Ed. (2d) 1247 was also asked to review a State Court judgment on the theory that Plaintiff was deprived of his Constitutional rights and that §1983 of the Civil Rights Act provided a remedy for damages. In this case the Court held

> The able district judge, who had the benefit of a pre-trial conference and of presiding over the trials on the motions to dismiss, construed the suit as an effort to relitigate the state litigation and to obtain a review of the decisions of the Texas courts and reversal of the Hanna decisions for error. Accordingly, the court below dis-

missed the complaint on the ground that it failed to state a claim within the original jurisdiction of the district court.

A federal district court has no original jurisdiction to reverse or modify the judgment of a state court... Unless alleged errors constitute a deprivation of constitutional rights, they may be reviewed only by the United States Supreme Court...

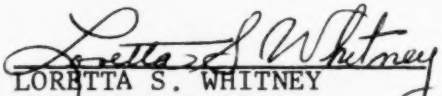
Turning to the Civil Rights Statutes, we find that Section 1981 of Title 42 U.S.C.A., although it provides all persons are entitled to equal rights under the law, has no provision for civil damages. Section 1983 affords a civil action for damages against a person who, acting under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution and laws. In this case, Hanna asserts his cause of action for damages against Home Insurance Company only. It is clear that Home Insurance Company was not acting under color of state law; Section 1983 therefore is inapplicable. Morever, Section 1983 does not provide a cause of action for a conspiracy to deny due

> process; there must be an actual denial of due process before a cause of action arises...
>
> The issue then is narrowed to the question whether Hanna states a complaint under Section 1985 for damages as a result of a conspiracy to deprive him of equal protection of the law. He must show a purposeful conspiracy to deny him due protection; mere errors or irregularities in the state court proceedings are not sufficient...

CONCLUSION

Respondent, JOAN H. COCKE, respectfully submits that the Petition for Certiorari is without merit and should be denied.

Respectfully submitted,



LORETTA S. WHITNEY
603 Luhrs Building
Phoenix, Arizona 85003

Attorney for Respondent
JOAN H. COCKE

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari, Joan H. Cocke, Respondent, were served on each party separately represented by depositing the same in the United States Post Office at Phoenix, Arizona, first class postage prepaid, addressed to counsel of record at their respective post office addresses as hereinafter set forth. I further certify that all parties required to be served have been served.

Richard Anthony Johnson
Attorney for petitioner Francis M. Cocke
132 South Central Avenue
Suite 7
Phoenix, Arizona 85004

Wallace O. Tanner, in propria persona
Attorney for respondents Arleigh H. Burton, Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife
3800 North Central Avenue
Phoenix, Arizona 85012

Hubert E. Kelly, in propria persona
Attorney for respondents Steven H. Schneider, Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife
550 West Washington Street
Phoenix, Arizona 85003

John R. Sticht
Attorney for respondents Irwin S.
Cantor, Eino M. Jacobson, and
Francis J. Donofrio
309 State Capitol Building
Phoenix, Arizona 85007

Powell B. Gillenwater
Browder & Gillenwater, P.C.
Attorneys for respondent Transamerica
Title Insurance Company
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

Ralph E. Hunsaker
O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears
Attorneys for respondents Powell B.
Gillenwater and Loretta S. Whitney
First Federal Savings Building
Suite 1800
3003 North Central Avenue
Phoenix, Arizona 85012

Loretta S. Whitney

LORETTA S. WHITNEY
603 Luhrs Building
Phoenix, Arizona 85003
Counsel for Respondent Joan H. Cocke